IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25-08-2006

C O R A M

THE HONOURABLE Mrs.JUSTICE PRABHA SRIDEVAN

Writ Petition No. 25873 of 2006
& M.P.Nos.1 and 2 of 2006

M/s. Kumaran Chemicals
R.S. No.91/4 & 91/5
Keezhaiyur South 36
T.R. Pattinam, Karaikal,
represented by its
Managing Partner D. Thillairaj ... Petitioner

Vs.

1. The Executive Engineer - V
Electricity Department,
Karaikal, Pondicherry.

2. The Assistant Engineer / Urban
T.R.Pattinam,
Karaikal, Pondicherry. ... Respondents

Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorarified mandamus calling for the records of the first respondent in Lr.No.787/EDK/EE V/JE/F.Kumaran/2006-2007, dated 08.08.2006 and quash the same as illegal, arbitrary and against the pinciples of Natural Justice and the provisions of the Electricity Act 2003 and consequently direct the respondents to consider the reply given to the show cause notice No.786/EDK/EE V/JE/F.Kumaran/2006-2007, dated 08.08.2006 and pass orders in accordance with the Electricity Act 2003 after furnishing the required down loan datas and affording reasonable opportunity of being heard to the petitioner.

For Petitioner : Mr.AR.L.Sundaresan, Senior Counsel
for Mr.K.Seshadri
For Respondents : Mr.K.K.Sasidharan, AGP (P)

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O R D E R

The petitioner was issued with a show cause notice on 08.08.2006, alleging that on 07.08.2006 when the H.T. service connection was inspected by the Asst. Engineer / Urban and the Junior Engineer / T.R.Pattinam in the presence of the petitioner's employee, malpractice's were found their as follows :

> " a) The sealed GI pipe leading from the secondary side of the Metering cubicle to the High Tension Static Meter had been tampered with and had been opened in one of the joints to enable clandestine access to the wires connecting the secondary side to the Meter.
>
> b) A sharp pin like object had been pierced through one of the wires and using a separate wire, the sharp pin like object was found connected to the ground earth, in the Transformer structure."

Since this amounted to an alternate path for the current, the respondent held that this was theft of energy, since the current actually consumed by the consumer would not be fully recorded by the meter.

2. The petitioner was asked to show cause as to why extra levy shall not be collected. Following on its heels, the notice for disconnection issued without prejudice to further action against the petitioner for theft of energy. The petitioner immediately came to Court, aggrieved that the show cause notice and the notice for disconnection was issued simultaneously and no opportunity was issued to the petitioner to show cause why there need not be any disconnection.

3. The learned Senior Counsel appearing for the petitioner would submit that the order passed is in violation of the principles of natural justice and is contrary to the provisions of the Electricity Act 2003, which is a complete code in itself. As per this Act, the disconnection can be done only in the manner provided for default of payment and in any event, the respondent will have to make provisional assessments as per Section 126, receive their objections and thereafter make their final assessments. Without going through the process laid down under the Act, they have half heartedly relied on the Old Act and passed orders.

4. The learned Additional Government Pleader (Pondicherry) appearing for the respondents submitted that in supersession of the aforesaid notice, provisional assessment order was passed on 23.08.2006, referring to the various acts amounting to the theft of energy and calling upon the petitioners to file their objection, if any. A copy of the order has been produced today. The learned

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counsel also submitted that in case of theft of energy, there is no right of hearing and the board may disconnect the supply of electricity forthwith without prejudice to its other rights. Though the new Act has come into force, in view of the saving Section 185 until Fresh Supply Code is laid down as per the new Act, the terms and conditions as per the old act will prevail.

5. Three Judgments were relied on. In (1996) 4 SCC 522 (M.P.ELECTRICITY BOARD v. HARSH WOOD PRODUCTS), the tampering with the electricity supply was detected and it was contended on behalf of the consumers that they has a right of hearing before the authority, takes action. This was accepted by the High Court, the Supreme Court set aside the Judgment of the High Court and allowing the appeal held that the notice of 7 days prior to disconnection would apply to a case of regular supply made and prior demand for payment of electricity charges and failure to pay with the given time, it would not apply to demand after detection of pilferage and therefore, in view of the conditions to which the respondents had agreed at the time of installation and also the prima facie conclusion reached by the authorities, it was not necessary to give further hearing to the respondents. The action taken by the appellant was held to be not violative of Articles 20(1), 14 of the Constitution and principles of natural justice.

6. In AIR 1998 SCC 1715 (M/s. HYDERABAD VANASPATHI LTD., v. A.P.S.E.B.), the Supreme Court held that

> " The Board in performance of statutory duty supplied energy on certain specific terms and conditions framed in exercise of a statutory power. Undoubtedly the terms and conditions are statutory in character and they cannot be said to be purely contractual. "

Therefore the terms and conditions are of a statutory character.

7. In (2005) 4 M.L.J. 462 (THE EXECUTIVE ENGINEER - IV, ELECTRICITY DEPARTMENT, PONDICHERRY v. VARADHA STEELS), the facts were almost identical to the case on hand and a provisional assessment was made on the ground that there was theft of energy. The objections raised was the officer appointed under the Electricity Act of 1910 cannot be deemed to be an officer, within the meaning of Explanation to Sec. 126 of the 2003 Act. His contention was repelled and held that

> " A perusal of the above provisions shows that any appointment made under the old Act will be deemed to be an appointment made under the new Act unless there is some inconsistency. In our opinion, there is no inconsistency because both under the old as well as the New Electricity Act, appointment of the Assessing Officer has to be made by the State Government and there is no dispute that Superintending

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> Engineer - III, Electricity Department, Pondicherry, who issued the notice dated 17.08.2005, has been appointed by the State of Pondicherry as the Assessing Officer. Hence, in our opinion, until a fresh appointment is made by the Sate Government as provided under Explanation (a) to Sec. 126 of the Act, the Assessing Officer appointed under the old Act has the authority and jurisdiction to make assessments under the new Act. Any other interpretation would create a legal vacuum and it is well settled that the law abhors legal vacuums. An interpretation should be taken which does not result in creating a legal vacuum. In our opinion, the interpretation we are taking will not result in any legal vacuum, namely, that the Assessing Officer under the old Act has a right to continue as the Assessing Officer under the new Act until the State Government appoints another person as Assessing Officer under Explanation (a) to Sec. 126 of the Act."

8. The learned Senior Counsel appearing for the petitioner submits the above cases may not strictly apply to the present case.

9. (1996) 4 SCC 522 (M.P.ELECTRICITY BOARD v. HARSH WOOD PRODUCTS), was distinguished on the ground that there the language of Clause 31 (e) provided for disconnection of supply and in the instant case, Sec. 56 which alone provides for disconnection, requires the issuance of 15 clear days notice in writing.

10. I am afraid, this objection must be rejected, since as per the terms and conditions in Clause 88, the Department has a power to disconnect the supply of electricity without prejudice to its other right. Therefore, while Sec. 56 may apply in a case, where there is a regular supply made and there is a period demand for payment, but not where there is a violation or theft of energy. The new Act provides for a State Commission to specify the electricity supply code to provide for the following :

> " For recovery of electricity charges, intervals for billing of electricity charges, disconnection of supply of electricity for non-payment thereof, restoration of supply of electricity, tampering, distress or damage to electrical plant, electric lines or meter, entry of distribution licensee or any person acting on his behalf for disconnecting supply and removing the meter, entry for replacing, altering or maintaining electric lines or electric plant or meter."

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11. It is not in dispute that this Electricity Supply Code has not been specified yet, until, then as held in (2005) 4 M.L.J. 462 (THE EXECUTIVE ENGINEER – IV, ELECTRICITY DEPARTMENT, PONDICHERRY v. VARADHA STEELS), there cannot be a vacuum, the statutory agreement between the parties as provided in the terms and conditions will hold the field.

12. In the case of theft of energy, there is no provision for opportunity or prior hearing. Therefore, the petitioner cannot be aggrieved and though the original show cause notice and the notice for disconnection were issued almost simultaneously, these have been superseded by the Provisional Assessment Order, dated 23.08.2006. It is open to the petitioner to file his objections to the same and after that the respondents shall pass orders as final assessment.

13. As per the provisional assessment order, the petitioner is required to pay a sum of Rs.1,10,32,627/- (Rupees one crore ten lakhs thirty two thousand six hundred and twenty seven only) for theft of energy. The learned Senior Counsel submitted that there has been regular verification by the Junior Engineers every month and all of a sudden, the petitioner cannot be made to pay this amount on the ground that there has been tampering of energy for six months. The learned Senior Counsel also submitted that the amount demanded is huge and some indulgence may be issued.

14. The writ petition is disposed of as follows :

The petitioner shall pay Rs.22,00,000/- (Rupees twenty two lakh only) in two instalments, one on or before 22.09.2006 and the next on or before 20.10.2006. The respondent shall pass the order of final assessment and if the petitioner fails to pay the amount as per this order, it is open to the respondents to recover the entire amount forthwith. The respondents shall reconnect the supply immediately on payment of the first instalment along with the reconnection charges. It is reiterated that if after reconnection, the payment of the second and final instalments is not made, it is open to the respondents to sever the supply. No costs. Consequently, connected miscellaneous petitions are closed.

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Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

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To

1. The Executive Engineer – V
   Electricity Department,
   Karaikal, Pondicherry.

2. The Assistant Engineer / Urban
   T.R.Pattinam,
   Karaikal, Pondicherry.

1 cc to the Senior G.P Cum Senior P.P (Pondicherry) Sr. 38408
1 cc to Mr.K. Seshadri, Advocate, Sr. 38404

W.P.No.25873 of 2006

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